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Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 24.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, APPELLANT,

v.

INTERSTATE COMMERCE COMMISSION, APPELLEE.

1. The Interstate Commerce Act is concerned only with interstate transportation and the published charges therefor, and with devices to evade its provisions.
2. For the deliveries of coal by the Chesapeake and Ohio Railway Company, under the contract herein assailed, the amounts received by that company were always in excess of its published tariffs.
3. The transaction herein considered was one conducted throughout in good faith and without device of any kind.
4. Any loss, under the contract, to the Chesapeake and Ohio Railway Company was a loss on the sale of coal and not on the published tariffs.
5. A case cannot be made without allegations that make it.
6. There is no allegation in this case, not even casual specification, of the discrimination or preference conceived by the lower court.

Brief for the New York, New Haven and Hartford Railroad Company.

JOHN W. DANIEL,
FRED HARPER,
Of Counsel.

J. P. BELL COMPANY, Printers, Lynchburg, Va.

Supreme Court of the United States,
OCTOBER TERM, 1905.

NO. 24.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, APPELLANT,

vs.

INTERSTATE COMMERCE COMMISSION, APPELLEE.

~~In error to~~ appeal from the United States Circuit Court for the Western District of Virginia.

INTRODUCTORY.

There is to be considered in this case a contract of sale and delivery of coal by one great corporation, the Chesapeake and Ohio Railway Company, to another, the New York, New Haven and Hartford Railroad Company.

The Chesapeake and Ohio Railway Company is a corporation of the state of Virginia. The New York, New Haven and Hartford Railroad Company is a corporation of another state. The contract of sale and delivery of the coal to the latter corporation was across state lines. This fact gave jurisdiction to the Interstate Commerce Commission.

Upon the case made by the Interstate Commerce Commission, the Circuit Court of the United States for the Western District of Virginia decided every point in favor of the New York, New Haven and Hartford Railroad Company, which is our client. The perusal of the Court's opinion in the case made will, as we confidently believe, satisfy this Court that it could not have decided differently, so clear and convincing is the reasoning of the judge who presided below.

After deciding all the points raised in the record against the complainant below, and in favor of our client, the Court itself raised a point upon which it cast our client in the suit.

We propose to consider the whole cause in this argument; and we beg leave to say, in advance of the orderly development of our views, that it seems to us that both the Chesapeake and Ohio Railway Company, which agreed to sell and deliver the coal, and the New York, New Haven and Hartford Railroad Company, which bought the coal, employed sagacious and energetic methods in that business at a period when acute crisis and panic in commercial matters had just passed and depression still lingered. They subserved the public interest when to subserve it was also to subserve their own.

The contract of the Chesapeake and Ohio Railway Company, by enabling it, the seller, to keep up business on its line, also enabled the buying railroad, our client, to supply itself with the primary necessity of its business—coal. Coal operation, transportation, and the business dependent upon them were alike promoted at a time when lockouts, strikes and disorders had but recently caused a shudder throughout the body politic. The transaction therefore tended to the side of renewed prosperity and peace.

While this was the obvious tendency of the contract between the two companies we do not contend that beneficial results could, of themselves, validate the transaction if it were in violation of the Interstate Commerce Act in the manner charged. Had our client been party to such a violation of the law it could not be defended.

But it is to be observed that the Court below decided that it was not a party to such violation of law and it is for the innocent of record that we have the honor to appear.

Upon an unsuggested theory, vague, remote, not within the charges of the complainant's petition, and, as we respectfully submit, untenable in reason and unsupported by precedent, the court below astonished all parties by its ruling.

We are satisfied that when this theory, foreign to the record, is discussed, this Court will find full ground to sustain both the New York, New Haven and Hartford Railroad Company and the Chesapeake and Ohio Railway Company. We are also satisfied that it will discover that the court below not only erred in inventing the theory upon which it acted, but, in a logical sense, overruled and departed from the views it had already lucidly set forth in holding both companies acquit of the charges that appear in the record.

There must be *allegatum* before there can be *probatum*. The *probatum* would be *aliunde* if not responsive to the *allegatum*. In point of fact, no *probatum* could have been attempted as to the point raised by the Court as there was no *allegatum* in the petition to call for it. And further, in point of fact, there was no *probatum* to sustain the holding of the Court even if there had been *allegatum* upon which it could have been based.

This view will be set forth in a separate part of this argument after we have discussed the questions that were properly before the Court.

PART I.

STATEMENT OF THE CASE.

1. THE FACTS.

The important facts in the case are as follows:

On December 3d, 1896, a contract was entered into by the Chesapeake and Ohio Railway Company and the New York, New Haven and Hartford Railroad Company, whereby the former undertook to

> "furnish to said Railroad Company not to exceed two million gross tons of bituminous coal from its line in such quantities monthly as wanted from July 1, 1897, to July 1, 1902, without charge for demurrage. Deliveries to be made not exceeding four hundred thousand tons per annum."

The Chesapeake and Ohio Railway Company further agreed in the said contract to

> "deliver all bituminous coal to said Railroad Company in its bins at such ports upon its line as required by the monthly requisitions of its purchasing agent."

In consideration whereof the New York, New Haven and Hartford Railroad Company agreed to pay for said coal

> "at the rate of two and seventy five one hundredths dollars per gross ton New Haven basis, settlement to be made monthly."

It was the usual character of contract for coal by the New York, New Haven and Hartford Railroad Company and was drafted on one of its printed blanks used in such cases.

(See *fac simile*, Record p. 190.)

Under this contract the Chesapeake and Ohio Railway Company began the shipment of coal to the New York, New Haven and Hartford Railroad Company, as demand therefor was made, and delivered the same to such ports as directed.

During the winter of 1900-1901 the Chesapeake and Ohio Railway Company, by reason of strikes and other disturbing causes, failed to make delivery of the full quantity of coal due under the contract for that year. By reason of such failure the New York, New Haven and Hartford Railroad Company was compelled to purchase coal from other sources to supply its needs. For such coal it was compelled to pay a higher price than it was paying under the contract with the Chesapeake and Ohio Railway Company. The amount of this excess for the year 1900-1901 was $160,000.00. A claim for this amount was presented to the Chesapeake and Ohio Railway Company and payment demanded. The claim was finally adjusted by the payment of $120,000.00. Record (p. 117.)

In 1902 a general strike of coal miners paralyzed the coal industry and so hampered the Chesapeake and Ohio Railway Company in its endeavors to secure coal to complete its shipments due under its contract, that, at the end of the period covered by the said contract (July 1, 1902), there remained undelivered—but called for—approximately 60,000 tons of coal.

On account of such shortage it was again necessary for the New York, New Haven and Hartford Railroad Company to purchase coal from other sources to supply its needs, for which coal it was compelled to pay a higher price than it was paying the Chesapeake and Ohio Railway Company under the contract. The amount of the excess this time was $103,910.69. (Record p. 118.)

Again a claim for this amount was presented to the Chesapeake and Ohio Railway Company and payment demanded. Liability was not denied by said Company, but, on account of the hardship of the case, the failure to comply with the terms of the contract being due to extraneous and uncontrollable causes, it was again adjusted. On this occasion the Chesapeake and Ohio Railway Company offered to complete its deliveries under its contract—asking an extension of time to do so, and the privilege of delivering Kanawha coal instead of New River coal. This offer was accepted by the New York, New Haven and Hartford Railroad Company; and in April, 1903, Presidents of the two companies entered into an oral agreement embodynig those terms. (Record p. 119.)

The performance of this agreement was immediately begun and it was partially executed when the temporary injunction awarded by the Court below in this case prevented further compliance.

2. LEGAL PROCEEDINGS; AND THE AFFIDAVIT BEFORE THE INTERSTATE COMMERCE COMMISSION.

On the 30th day of June, 1903, W. C. Bullitt, a coal merchant of Philadelphia, filed an affidavit with the Interstate Commerce Commission setting forth the main facts as above related and charging the Chesapeake and Ohio Railway Company with departing from its published rates on file and with committing a discrimination "against all the other coal produced in the Kanawha District."

It was the FREIGHT RATE ON COAL

"from the said Kanawha District of West Virginia to Newport News"

that he complained of. He alleged that it prevented him from purchasing coal in the Kanawha District of West Virginia. THIS WAS THE GRAVAMEN OF HIS COMPLAINT.

On July 3rd, 1903, the Interstate Commerce Commission, acting upon the affidavit of Bullitt, requested Mr. G. W. Stevens, President of the Chesapeake and Ohio Railway Company, to appear and testify with reference to the facts therein set forth. Mr. Stevens did appear and gave a lengthy deposition relating to the whole transaction. (See Record pp. 12-40.)

3. PETITION OF THE INTERSTATE COMMERCE COMMISSION.

On July 13th, 1903, the Interstate Commerce Commission filed a petition in the Circuit Court for the Western District of Virginia asking certain injunctive and other orders against the Chesapeake and Ohio Railway Company and the New York, New Haven and Hartford Railroad Company. To this petition was attached, as a part thereof, the record of the hearing before the Interstate Commerce Commission at which Mr. Stevens had testified, and to which hearing the Chesapeake and Ohio Railway Company was the sole respondent.

The petition of the Interstate Commerce Commission in the Circuit Court recited the main facts of the case as set forth above and, referring to the performance of the terms of the oral agreement of April 1903, alleged and charged that:

> "the said Chesapeake and Ohio Railway Company is engaged in carrying freight traffic between the Kanawha District in the State of West Virginia and Newport News in the State of Virginia
>
> 1. *at less than its published rates on file*, and
>
> 2. is committing a discrimination forbidden by law, and that said act or acts hereinafter more specifically set forth are being committed in part in the Western Judicial District of the State of Virginia, and that such freight traffic is being carried for the New York, New Haven and Hartford Railroad Company as hereinafter more specifically set forth." (Record pp. 1-2.)

As to the New York, New Haven and Hartford Railroad Company it alleged:

"Your petitioner believes that the New York, New Haven and Hartford Railroad Company received the rebate or concession upon the traffic carried for it as aforesaid knowingly, and that said railroad company is acting equally in violation of law with the Chesapeake and Ohio Railway Company." (See Record p. 4.)

The Chesapeake and Ohio Railway Company and the New York, New Haven and Hartford Railroad Company were made parties defendant, a temporary injunction was awarded prohibiting further acts under the said contract of 1903, and the motion for permanent injunction was set down for argument.

4. THE DECREE OF THE CIRCUIT COURT.

After several continuances, the motion was argued and on February 19th, 1904, the Court filed its opinion and entered its decree. The decree, in substance, declared:

1. That the claim of the New York, New Haven and Hartford Railroad Company against the Chesapeake and Ohio Railway Company for $103,910.69, asserted as damages for partial nonperformance of the contract of December 3rd, 1895, is, as to the said claim and as to interest thereon, an illegal and unenforceable claim.

2. That the verbal agreement of April 1903, as set forth above, is an invalid and illegal agreement.

And the Court permanently enjoined the defendants from executing or performing or attempting in any way to execute or perform either of the said contracts; and further enjoined them from discharging or satisfying or attempting to enforce the payment of any claim arising thereunder. (Record pp. 228-229.)

A subsequent motion of the Interstate Commerce Commission to enlarge the terms of the injunction was overruled by the Court and the decree appealed from is as briefly set forth above.

5 ASSIGNMENT OF ERROR.

On March 18th, 1904, the New York, New Haven and Hartford Railroad Company, having served notice of joinder or severance on the Chesapeake and Ohio Railway Company, filed a petition of appeal which was allowed the same day. With its

petition the New York, New Haven and Hartford Railroad Company filed an assignment of errors briefly stated as follows:

1. That the Court erred in holding the claim for $103,910.69, arising from partial nonperformance of the contract of December 3rd, 1896, to be an illegal and unenforceable claim.

2. That the Court erred in holding the verbal agreement of April 1903 to be invalid and illegal.

3. That the Court erred in perpetually enjoining the Chesapeake and Ohio Railway Company from executing or performing either of said contracts.

4. That the Court erred in perpetually enjoining the New York, New Haven and Hartford Railroad Company from demanding or seeking the enforcement of the payment of the claim growing out of the partial nonperformance of the said contract of December 3rd, 1896.

5. That the Court erred in not dismissing the complainant's petition in said cause.

6. That the Court erred in holding the facts proved to constitute a violation of the third section of the Interstate Commerce Law.

7. That the interpretation put upon the language of the third section of the Interstate Commerce Law by the said Court is erroneous and unjust to said appellant, and the complainant did not allege that the appellant had violated the said section or any provision thereof.

8. That the Court erred in holding that the complaint alleged a violation of the said third section of the Interstate Commerce Law, and in finding that there was evidence to sustain that charge.

9. The decree is in other respects erroneous and unjust to appellant.

PART II.

ARGUMENT OF THE CASE OF RECORD.

The petition of the Interstate Commerce Commission in the Court below charges the defendant companies with violating the Interstate Commerce Act by carrying out the terms of the verbal agreement of April 1903, which is alleged to involve a carriage of

coal for less than the published rates on file and a discrimination forbidden by law.

1. THE CONTRACT OF 1903.

The defendant companies justify the terms of the contract of 1903 on two grounds:

(1) *That the contract of 1903 does not involve a violation of the Interstate Commerce Act.*

(2) *That if a seeming violation of the said Act does occur, it is a seeming violation only; for in fact the contract is based upon a legal, adjusted and enforceable claim for damages asserted by the New York, New Haven and Hartford Railroad Company against the Chesapeake and Ohio Railway Company; and in fact the freight rate is fully paid by the claim in part and by the purchase price received for the coal added thereto.*

If it be held that any loss to the Chesapeake and Ohio Railway Company growing out of the said contract of 1903 is a loss on transportation charges, and is, therefore, in effect, a less rate than the published rate on file, nevertheless this is a mere misleading statement and presents a half fact rather than a whole one. The released claim is a credit entering into the account and paid on the freight rate; and the mind should not be deluded or a false conclusion reached from a mere method of statement which does not count the weight which is really in the scales and which represents an actual and valid sum of money due to the recipient and received and accounted for in consideration of the freight carried. This is the realism and good faith of the transaction which, if unimpugned as such, must be accorded the consideration of actuality and not perverted by delusive sentences into another and different thing.

a. THE OPINION OF THE COURT AS TO THE CONTRACT OF 1903.

The Court below said in its opinion:

> "Inasmuch as no action by the court is asked because of the transactions prior to 1903, the legality of the contract of 1896 is of interest now, because on its legality depends the validity of the demand made in April 1903, by the New

York, New Haven and Hartford Railroad Company that the Chesapeake and Ohio Railway Company pay the bill of damages of about $103,000. In the answers of both defendants the justice of this demand is asserted. This bill is alleged to be (and I find no evidence to the contrary) the actual difference between the cost of the coal purchased by the New Haven Company from others and what would have been the cost to it had the Chesapeake and Ohio fulfilled the contract of 1896. The demand, therefore, cannot properly be considered an unadjusted or vague and unliquidated claim. The inference to be drawn from *Goodridge* v. *Union Pacific*, 37 Fed. 182, and *Union Pacific* v. *Goodridge*, 149 U. S. 690, is that an adjusted claim, if otherwise valid and enforceable, may be paid by a carrier by hauling for such creditor at a reduced rate, the difference between the schedule rate and the agreed rate being applied as a credit on the claim. While these opinions are obiter as to the question which we are now considering, as it did not arise in the above mentioned case, still it seems to me that this conclusion is sound. Where a carrier owes a legal, enforceable, and ascertained sum of money, I cannot perceive that the commerce act is violated if the debt be paid by carriage done by the carrier for its creditor at the carrier's legal freight rate." (Record pp. 216–217.)

Thus the contract of 1896 is the real transaction to which this cause must have reference and under which it must stand or fall. If that contract be valid and legal, the claim for damages was just, legal and valid, and enforceable; and the contract of 1903 is likewise legal and valid. If the contract of 1896 be illegal and void, then no breach thereof could furnish a basis for any new contract and the new contract must stand alone.

2. THE CONTRACT OF 1896.

It is perfectly apparent from an inspection of the record of this case that the contract of December 3rd, 1896, was purely and simply a *sale of coal* by the Chesapeake and Ohio Railway Company to the New York, New Haven and Hartford Railroad Company for a sum certain per ton delivered in its bins along its lines. The contract is susceptible to no other construction.

And the Chesapeake and Ohio Railway Company was likewise the shipper of the coal sold. It is true that various coal operators furnished the coal under contract with the Chesapeake and Ohio Railway Company, and various companies and individuals superintended the shipments thereof. But they were in each instance acting for the Chesapeake and Ohio Railway Company and it was always the latter that was the shipper of the coal over its own line and over the water route.

a. OPINION OF THE COURT AS TO THE CONTRACT OF 1896.

The Court below disposed of these two questions in its opinion as follows:

> " . . . it seems to me that in truth the C. & O., ... was the first party to the Beury contract, and that as to the transactions prior to April 1903, we must treat it as a carrier which purchased coal at mines on its road and delivered it to a purchaser after hauling the coal over its own line and having it carried and discharged by vessels employed by it." (Record p. 216.)

3. THE QUESTION OF ULTRA VIRES NOT INVOLVED.

It being true that the Chesapeake and Ohio Railway Company was the seller of the coal to be furnished under the contract of 1896, the complainant below (The Interstate Commerce Commission) cannot be heard to question the said contract as a sale of coal merely, because it has no interest in the mere vending of the coal that would give them a status in any court. And whether or not the Chesapeake and Ohio Railway Company had the legal right to buy and sell coal is a question with which the Court below—and this Court as well—has nothing to do so far as this case is concerned.

The *ultra vires* acts of a corporation can only be attacked by the sovereignty granting the charter or by some stockholder or other person interested in the corporation. They cannot be assailed by third parties.

Green's Brice's *Ultra Vires*, (2 ed.) 695;
4 Thomp. Corp. (5638);
5 Thomp. Corp. (6030–6032–6033–6034.)

a. THE COURT'S OPINION THAT ULTRA VIRES IS NOT INVOLVED.

In this connection the Court below very properly held:

a. That no third party can be heard to raise the question of *ultra vires* unless in some case where such party is directly injured by the *ultra vires* acts. (Record p. 117.)

b. That the Chesapeake and Ohio Railway Company has not raised that question; that the State of Virginia has not raised it; that no creditor has raised it; and farther, that "no federal law has been contravened by this contract in so far as it is merely *ultra vires*; and I do not perceive the right of the Interstate Commerce Commission to raise the question here." (Record p. 218.)

c. If this question could not be raised in this Court by the Chesapeake and Ohio when sued on the contract, surely no other party can raise it collaterally. (Record p. 219.)

d. "We are not at liberty to consider the question of *ultra vires* nor are we free to consider the contract of 1896 as illegal on account of the West Virginia statute." (Record p. 219.)

4. THE WEST VIRGINIA STATUTE NOT INVOLVED.

And likewise the West Virginia statute, prohibiting railroad companies from buying and selling coal and coke, has no application to this contract. The reasoning of the court below in disposing of this question is unassailable. The Court said:

"The contract does not stipulate that the C. & O. shall go into West Virginia and there buy coal. I say this, because, while the contract was to furnish coal from the line of the C. & O., there is no evidence that there is no bituminous coal field on the line of the C. & O. in Virginia. The burden of proof here is on the complainant (Benjamin on Sales (6th ed.), page 509). This court cannot take judicial notice of the fact (if it be such) that the only coal fields on the line of the C. & O. are in West Virginia. Moreover, this contract could have been complied with to the letter if the C. & O. had purchased of dealers in Virginia coal that had been mined on its line in West Virginia, and which had been brought into Virginia while the property of the dealers. And, surely, a contract by a Virginia corporation, not made in West Virginia, and not to be performed in that state, cannot be held by this Court to be in contravention of

the West Virginia statute. . . . Where a contract does not require a vendor to do an act prohibited by law in order to obtain the property he is selling, and where the vendee does not know that intent of the vendor, and especially where the contract could be performed without a violation of the law, it seems to me that this Court would not be warranted were the vendee suing the vendor for a breach of the contract to allow the latter to raise the question of illegality. To allow the delinquent to escape the obligation of his contract savors too strongly of allowing a wrongdoer to take advantage of his own wrong. If this question could not be raised in this court by the C. & O. itself, when sued on the contract, surely no third party can raise it collaterally." (Record pp. 218–219.)

5. THE INTERSTATE COMMERCE ACT.

If the contract in question be held to be illegal and void on any ground at all, it must be so held because of the terms of the federal statutes regulating interstate commerce. The only sections, as we contend, of the Interstate Commerce Act alleged by the petition in the Court below to have been violated, are sections 2 and 6.

a. THE SECOND SECTION NOT VIOLATED.

The second section of the Interstate Act is as follows:

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less *compensation* for any service rendered or to be rendered, in the *transportation* of passengers or property subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and cotemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be declared guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

(1) THE GOOD FAITH OF THE CONTRACT OF 1896.

It is admitted that if the contract of December 3rd, 1896, were made *for the purpose and with the intention* of giving to the

New York, New Haven and Hartford Railroad Company a "special rate, rebate, or drawback" with reference to the transportation of the coal to be delivered thereunder, then the contract would have been a "device"; and it would have been in violation of section 2, now under consideration.

But there can be no question that the said contract was one for the sale and transportation of coal made in the utmost good faith and without any intent or purpose to give such "special rate, rebate or drawback."

Mr. John M. Hall, then President of the New York, New Haven and Hartford Railroad Company, stated in his affidavit:

> "Neither this defendant nor its officers had any knowledge of the price that the Chesapeake and Ohio Railway Company expected to pay for the coal at the mines, nor of the tariff rates, at that time existing, from the mines to Newport News, nor the water freight from Newport News to New Haven, Connecticut; Providence, Rhode Island; or Boston, Massachusetts. . . . This defendant *does not receive and has not received at any time any rebate or advantage of any kind in transportation of coal over the lines of the Chesapeake and Ohio Railway Company.* . . . It has not now and never has had during its dealings with the Chesapeake and Ohio Railway Company any purpose or desire to transgress, evade or in any way nullify the provisions of the Interstate Commerce Law as to uniform rates of transportation." (Record pp. 117–120.)

And Mr. M. E. Ingalls, former President of the Chesapeake and Ohio Railway Company, states in his affidavit:

> "And this deponent further says that in this whole matter he, the said M. E. Ingalls, acted according to his judgment in the best interests of all concerned, that he, the said M. E. Ingalls, regards the contract with the Chesapeake and Ohio Railway made through him with the New York, New Haven and Hartford Railroad Company as having saved the Chesapeake and Ohio Railway Company a place in the market, having kept the mines along its lines going and the mine laborers therein at work, and kept the said cola in the market; that the said arrangement was of the greatest benefit not only to the Chesapeake and Ohio Railway

Company but to the community served by it known as the New River District." (Record p. 115.)

In other words the Chesapeake and Ohio Railway Company entered the field as a dealer and made the contract of December 3rd, 1896, in order to save itself as a carrier.

(2) THE COURT'S OPINION UPHOLDING THE CONTRACT OF 1896. NO RUSE OR DEVICE.

The Court below in its opinion, said:

"I can find no evidence in the record which satisfies me that in making the contract of 1896, the C. & O. intended a ruse or device to give a rebate on freight rates to the New Haven Company." (Record p. 222.)

"I do not find here that the contract of 1896 was intended as a ruse or device to evade the Commerce Act. It appears to have been an entirely honest effort by Mr. Ingalls to find a market for coal produced on his line." (Record p. 220.)

"But in the case at bar I am unable to find evidence of an intent to carry at less than the published rates of the C. & O." (Record p. 221.)

If, therefore, the contract of December 3rd, 1896, be held to be illegal under the said section 2 (or any other provision of law), it must be so held because of its *necessary* legal effect apart from the intent with which the said contract was made.

Section 2 of the Interstate Commerce Act prohibits any "special rate, rebate, or drawback" whether given "*directly or indirectly.*" There is absolutely no evidence in the record of such direct special rate, rebate or drawback. The absence of the intent to violate the law, as found by the Court below, would dispose of that feature of the case. The only remaining question, therefore, under this section is: Was there any "special rate, rebate or drawback" on the *transportation* of the coal in question over the line of the Chesapeake and Ohio Railway Company given *indirectly?*

The reasoning of the Court below, in its opinion on this point, seems to us to be unanswerable. The Chesapeake and Ohio Railway Company was the vendor of the coal. It was also the

carrier thereof. It charged the New York, New Haven and Hartford Railroad Company a fixed sum per ton for both the coal and its transportation. It had a perfect legal right to charge any losses that may have occurred to its account as vendor rather than to its account as carrier. Indeed, the provisions of the law required that its full freight rate shall be charged and collected and the Company *could not legally* charge any losses to its account as carrier, just as it could not charge any profits from the contract to its freight rate account. So long as there was a sufficient sum paid to it under the contract to pay its transportation charges (and this was always the case in the matter now under investigation) then the law makes the application to those charges.

As the Court below said:

> "If the carrier under such circumstances does not on its books credit its freight account with its published rates, and does not charge the loss to an account kept with the article dealt in, or to income, there would be a seeming violation of the 2nd and 6th sections of the Act. But this would be at the utmost a technical violation (if it has a right to suffer loss as a dealer), and it seems to me that it could with difficulty be considered a violation in any sense. The law is not concerned with the carrier's methods of book-keeping. When the dealing is not a device to evade the law, and if the carrier can legally suffer a loss as a dealer, it seems to me matter of no moment that it go through the form of crediting its full freight earning on the transportation account, and charging the loss on the transaction to an account kept with the article dealt in, or to some other account." (Record pp. 220–221.)

And so long as a sufficient sum is realized from the sale of the coal by the vendor-carrier to cover its transportation charges, bearing in mind that the contract of sale is not a mere device to evade the law, there can be no unjust discrimination in the freight rates. As was said by Cooley, Chairman, in *Haddock* v. *Delaware, Lackawanna and Western Railroad Company*, 4 I. C. C. Rep. 296:

> " . . . . There is, from the very nature of the case and because of the situation—the respondent being both carrier and shipper—a situation that we must assume we can in no wise change or alter, an absolute impossibility of applying any definite rule whereby unjust discrimination can be determined."

And in *Coxe* v. *Lehigh Valley Railroad Company*, 4 I. C. C. Rep. 535, another similar case in which the Railroad Company was alleged to have violated the law by discriminations in favor of a coal company, all of the stock of which was owned by the Railroad Company, Morrison, Commissioner, said:

> "And while the coal company in the exercise of its chartered rights may acquire and hold mineral and other lands, at its own pleasure, mine and buy coal without restraint as to cost, and sell it at whatever price it may be willing to accept and is able to obtain, it is impracticable to regulate or cause the discontinuance of the conditions and methods of business, which result in the undue preference and discrimination complained of in this branch of the case."

And so here, the Chesapeake and Ohio Railway Company, so far as the parties to this case are concerned, having a perfect legal right to buy and sell and ship coal, to purchase at such price as it might be willing to pay, and to sell at such price as it might be willing to accept and able to obtain, it is impracticable to cause the discontinuance of such buying and selling. As the Court below said:

> "Being unable, therefore, to find in the law anything which forbids a carrier to be a dealer in articles to be carried by it, and also being unable to find anything which forbids it as a dealer to suffer honest losses, I am unable to say that the transactions in question were in violation of the 2nd section of the Act." (Record p. 223.)

As was intimated in *Coxe* v. *Lehigh Valley Railroad Company*, above cited, the fact that a vendor-carrier was willing to sell coal and transport it for such sum as was insufficient to pay all expenses, cost of coal, and transportation charges, would be evidence that its rates were too high and that it was willing to carry such freight at a cheaper rate. So here, if the facts proved show that the

Chesapeake and Ohio Railway Company is willing to contract for the sale and transportation of coal at a less sum than will pay all costs, expenses and its full published freight rates, it is evidence that such rates are too high and that the Chesapeake and Ohio Railway Company is willing to transport such coal at a cheaper rate.

But there is no allegation in the petition that the rates are excessive or unreasonable. There is no prayer that the Court will so hold. And so long as there is a sufficient sum realized from a sale honestly made by a vendor-carrier to pay its full transportation charges, there can be no discrimination with respect to those charges, and there is no violation of section 2 of the Act.

b. SECTION 6 OF THE INTERSTATE COMMERCE ACT NOT VIOLATED.

The same reasoning will apply to section 6 of the Act. This section, so far as its terms are in question in this case, is as follows:

> "And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any service in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force."

If the conclusion reached with reference to section 2 of the Act is correct, then no discussion of section 6 is necessary. If the Chesapeake and Ohio Railway Company has a right to charge its losses under the contract of 1896 to its account as dealer, paying itself its full freight rates for the transportation of the coal in question, then it did not charge the New York, New Haven and Hartford Railroad Company less than its published rates on file, as alleged, and there was no violation of section 6 of the Act.

6. THE COURT'S DISPOSITION OF THE CASE MADE.

Two charges are made in the complaint of the Interstate Commerce Commission against the Chesapeake and Ohio Railway

Company and the New York, New Haven and Hartford Railroad Company:

1. That the Chesapeake and Ohio Railway Company "is engaged in carrying freight traffic between the Kanawha District in the State of West Virginia and Newport News in the State of Virginia at less than its published rates on file, and is committing a discrimination forbidden by law." (Record p. 1.)

A variation of this charge appears on page 4 of the Record where it is alleged that the Chesapeake and Ohio Railway Company:

"Is engaged in the carriage of freight traffic between the points set forth above at less than its published rates on file, and is committing a discrimination against all other coal produced in the Kanawha District of West Virginia, which said discrimination is forbidden by law."

2. That the New York, New Haven and Hartford Railroad Company "received the rebate or concession upon the traffic carried for it as aforesaid, knowingly, and said railroad company is acting equally in violation of law with the Chesapeake and Ohio Railway Company."

It will be observed

1. That the Chesapeake and Ohio Railway Company was the carrier of the freight:

2. That the New York, New Haven and Hartford Railroad Company was neither the shipper of the freight, the carrier of the freight, nor, save in one respect, alleged to have violated law. That is to say, in respect to the allegation that it received the rebate or concession upon the traffic carried for it as aforesaid, knowingly.

When it was held by the Circuit Court on the trial that the Chesapeake and Ohio Railway Company *had not carried freight at less than its published rates on file* and *had not committed the alleged discrimination forbidden by law*, the case ended as to the New York, New Haven and Hartford Railroad Company, which could not, of course, have received the concession that had not been made.

The Court in its opinion expressly declared:

1. Its inability to find evidence of an intent to carry at less than the published rates of the C. & O. (Record pp. 221-222.)

2. That the contract was not intended as a ruse or device to evade the Commerce Act. (Record p. 220.)

3. That it appears to have been "an entirely honest effort by Mr. Ingalls to find a market for coal produced on his line." (Record p. 220.)

4. That there is no evidence in the record "which satisfies me that in making the contract of 1896, the C. and O. intended a ruse or device to give a rebate on freight rates to the New Haven Company." (Record p. 222.)

5. That being unable to find in the law anything which forbids a carrier to be a dealer in articles to be carried by it, and also being unable to find anything that forbids it as a dealer to suffer honest losses, "I am unable to say that the transactions in question were in violation of the 2nd section of the Act." (Record p. 223.)

6. That "No discussion of the 6th section of the act is necessary. If the transactions prior to 1903 did not violate the 2nd section, they did not violate the 6th section." (Record p. 223.)

It will thus be seen that in the most emphatic way and with the clearest specification the Court completely exonerated this respondent below from the charge which it was summoned to answer; and we proceed to discuss what was nevertheless the holding of the Court, with its own manifest opinion that there was no proof in the record that upheld the charge and that this respondent was acquit thereof.

PART III.

THE INVENTED CASE AND THE COURT'S DECISION THEREOF.

We come now to the consideration of the case which was invented by the Court, a case not presented, as we conceive it, by the pleadings and one that should not have been considered at all.

And even if it had been properly before the Court upon the pleadings, the decision thereof was, as we shall attempt to demonstrate, erroneous and not justified by a proper interpretation of the language of the section which the Court itself invoked.

In respect to the question which the Court does decide against our client it should also be borne in mind, before we state it, that the Court below declares:

> 1st. "If the commerce act was not violated by the transactions prior to April 1903, then on that date the C. & O. was, so far as this Court can say, legally obligated to pay to the New Haven Company the $103,000 claimed as damages for failure to make deliveries." (Record p. 219.)
>
> 2d. That in reaching this conclusion of fact the Court regards the C. & O. as both the vendor and the carrier of coal; and holds this action in both characters to be unquestionable in this case, excepting only as to whether such dealings are mere devices to cover an intentional giving of less rates of carriage to some than to others. (Record p. 220.)
>
> 3d. "The law is not concerned with the carrier's method of book-keeping. Where the dealing is not a device to evade the law, and if a carrier can legally suffer loss as a dealer, it seems to me a matter of no moment that it go through the form of crediting its full freight earnings on the transportation account, and charging the loss on the transaction to an account kept with the article dealt in, or to some other account." (Record pp. 220–1.)

An additional fact not to be overlooked is the declaration of the Court that the "price received for the coal was in excess of all cost items including the C. & O. freight charge for January and February, and from April to and including October, 1899." The net result for that period showed a profit. But it also holds that "Since October 1899, there has always been a loss" to the Chesapeake and Ohio (in the aggregated account of sale price and freight received by the Chesapeake and Ohio) and that "stopping the account at January 1, 1903, the loss largely exceeded the gain."

The transaction then which we have to deal with, as stated by the Court, is a legal transaction conducted in good faith, which

at periods produced a net profit and at other times produced a loss to the Chesapeake and Ohio. The Court estimates this loss to the Chesapeake and Ohio as averaging over 23 cents per ton on the actual deliveries.

When we proceed to the merits of the juridically invented charge we find that it is itself extenuated and applied without any sort of specification of any person affected by it, or to any PARTICULAR TRAFFIC transaction affected by it. It seems plain also that, with absolute good faith proclaimed in the transaction which took place, and with absolute validity thereof declared by the Court as a question of law, any deduction of undue or unreasonable preference or advantage to anybody, or undue or unreasonable prejudice or disadvantage to anybody, would of necessity be a *non sequitur*.

1. SECTION 3 OF THE INTERSTATE COMMERCE ACT.

Having disposed of the case as it had been made, the Court turned its eyes to the 3d section of the Interstate Commerce Law, which is as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this act
>
> (1) to make or give any undue or unreasonable preference or advantage
>
> (2) to any particular person, company, firm, corporation, or locality, or
>
> (3) any particular description of traffic,
>
> in any respect whatsoever, or to subject
>
> (1) any particular person, company, firm, corporation, or locality, or
>
> (2) any particular description of traffic,
>
> (3) to any undue or unreasonable prejudice or disadvantage
>
> in any respect whatsoever."

(The method of quotation and inserted figures are our own.)

And it was under this provision of the Interstate Commerce Act that it gave opinion and decree that the transaction between the Chesapeake and Ohio Railway Company and the New York, New Haven and Hartford Railroad Company was null and void.

a. VIOLATION OF SECTION 3 NOT ALLEGED.

It is assigned as error by the Appellant, the New York, New Haven and Hartford Railroad Company,

> "That the said Court erred in holding and deciding that the complaint duly alleged and charged that an offense had been committed by the appellant against the provisions of the third section of the Interstate Commerce Act."

It is to be observed that neither the relator, W. C. Bullitt, upon whose affidavit the machinery of the Interstate Commerce Commission was set in motion, nor the Interstate Commerce Commission itself, in its complaint, had ever intimated that the Chesapeake and Ohio Railway Company had made or given any "undue or unreasonable preference or advantage" either to this respondent or to anybody else.

It is to be observed also that neither the relator nor the Commission had imputed to the Chesapeake and Ohio the subjection of "any particular person, company, firm, corporation or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

And it is to be still farther observed that this respondent was not alleged to have any complicity in or knowledge of any such preference, advantage, prejudice or disadvantage.

Nevertheless the Court considered this section, which had not been brought into consideration by the case made, and extenuated the meaning of the charges in the complaint of the Interstate Commerce Commission to such degree as to embrace a matter not in contemplation of any party and not, as we conceive, within the sense of the law under which the charges were made.

In a supplemental opinion the Court said:

> "It will be found that the petition charges that the C. and O. 'is engaged in carrying freight . . . . at less than its published rates on file, and is committing a discrimination forbidden by law.' Again, 'Petitioner . . . . charges that the Chesapeake and Ohio Railway Company in this transaction is engaged in the carriage of freight . . . . at less than its published rates . . . . and is committing a discrimination against all other coal produced in the Kanawha District.'" (Record p. 230.)

Under this strained interpretation of the charges it held as follows:

> "Having found that some or all of the persons concerned with the Kanawha coal destined for points beyond the Capes other than that for the New Haven Company were subjected to an undue disadvantage, it follows that I have found that this particular traffic has been subjected to such disadvantage." (Record p. 230.)

We respectfully submit that the terms of the charge distinctly show that the complainant regarded the alleged carriage of freight at less than published rates on file as being the particular and only discrimination forbidden by law. No other discrimination was conceived by any party to the cause, nor could have been, as we contend, reasonably conceived from the reading of the complaint and the statute upon which it rested.

b. PROCEEDINGS UNDER THE ELKINS ACT.

It is true that the Elkins Act provides remedies and procedure in cases arising under the Act to Regulate Commerce, and its terms must be looked to in determining general questions of pleading in such cases.

See *Missouri Pacific R. R. Co.* v. *U. S.*, 189 U. S. 284.

And it is true that the 3d section of the Elkins Act provides that the Circuit Courts of the United States having jurisdiction, sitting in equity, shall proceed

> "summarily to inquire into the circumstances upon such notice and in such manner as the Court shall direct and without the formal pleadings applicable to ordinary suits in equity. . . ."

But we confidently contend that, however informal the pleadings may be in interstate commerce proceedings, and however untechnical a court is allowed to be under the 3d section of the Elkins Act, it is inconceivable that it was within the purview of that Act to wipe away the landmarks and bulwarks of jurisprudence and to permit a cause uncharged to be heard and adjudicated; or to engraft upon a charge that is made one that is wholly different and to which no one has been summoned to answer.

The '*allegata*' and the '*probata*' must conform in all manner of legal proceedings. '*Probata*' that are not '*allegata*' are irrelevant. Unless the two things come together there is no case. It is not for courts to make cases. Their sole function is to decide them when made by the parties before them.

The petition in the Court below was drawn with an eye single to the language of the Elkins Act concerning carriage at less than the published rates. The prayer of the petition is based on the supposed meaning and intent of that Act. Counsel representing the Interstate Commerce Commission below were specific and aggressive in their insistence upon this truth and urged upon the Court the language of the Elkins Act as completely covering this case.

There was no attempt in the petition to allege a violation of the 3d section of the Act to Regulate Commerce.

c. A DECISION OF THIS COURT IN POINT.

The third section of the Interstate Commerce Act prohibits "*undue or unreasonable preference or advantage*" and "*undue or unreasonable prejudice or disadvantage.*" Clearly the prohibited advantage or disadvantage in order to be unlawful must be "undue or unreasonable."

> "And as there is nothing in the Act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions, not of law, but of fact."
>
> *Texas and Pac. R. R. Co.* v. *Interstate C. C.*, 162 U. S. 219.

And the violation should be pleaded or alleged.

Yet nowhere in the petition does the words "undue" or "unreasonable" occur.

Nowhere in the petition is the allegation made that any "preference or advantage" is given.

Nowhere in the petition is it alleged that any person, place, or particular description of traffic is subjected to any "prejudice or disadvantage."

We submit that there is no allegation in the petition that would have put the defendants below on notice that they would

be called upon to answer a charge of violation of the 3d section of the Act to Regulate Commerce.

The allegations that are made in the petition and upon which the Court below rested its decision are that the defendants were violating the law by an agreement for the carriage of freight at less than the published rates of the Chesapeake and Ohio Railway Company and that a discrimination forbidden by law was being committed against all other coal produced in the Kanawha District.

These allegations follow the wording of the Elkins Act almost exactly. And it is respectfully urged that the only reasonable and just interpretation to be put upon these allegations is that they contain a charge of carriage at less than the published rates on file, and any discrimination alleged is confined to such as grows out of that carriage at less than the published rates on file. That was the interpretation placed upon the petition by counsel who drew it; that was the interpretation urged by them in the Court below. It was the only charge pretended to be made in the petition.

It related solely to transportation and the charges therefor, "from the Kanawha District to Newport News." It had nothing to do with the supposititious and imagined, but undiscoverable parties or persons in New England, to "some or all" of whom are ascribed disadvantages which are undefined and are also imaginated and supposititious.

In the case of *Texas and Pacific Railroad Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, the Interstate Commerce Commission proceeded, under the Act to Regulate Commerce (which is almost in the identical language of the Elkins Act so far as procedure in Court is concerned) to enforce the observance of its order by the Texas and Pacific Railroad Company. The main question at issue was what circumstances and conditions had been, and what should have been, considered by the Commission in making its order.

The Circuit Court of Appeals sustained the Circuit Court on the ground that even if ocean competition did create a dissimilar

condition to competition wholly on land, yet the difference in rates that were proved in the case was too great to be justified by that condition. Mr. Justice Shiras, delivering the opinion of this Court which overruled that view, said:

> "This cause proceeded, we think, upon an erroneous view of the position of the case. *That question was not presented* to the consideration of the Court. *There was no allegation* in the Commission's bill or petition that the reduced rates charged by the defendant company were unreasonable. *That issue was not presented.*"

Thus it was held that, though the pleadings under the statute were permitted to be informal, yet no decision could be had on a case not presented.

So here, in order to justify the court in considering the question of undue or unreasonable prejudice or disadvantage, it should be alleged.

d. PROVISIONS OF SECTION 3 NOT VIOLATED.

The sixth assignment of error of the appellant is as follows:

> "That the said court erred in holding that the facts proven in said case constituted any violation of the third section of the Interstate Commerce Act."

The Court below in considering the third section of the Act to Regulate Commerce laid great stress on the words "in any respect whatsoever." And it reached the conclusion that any undue or unreasonable preference or advantage, or any undue or unreasonable prejudice or disadvantage, is within the inhibition of the said section, however it might arise, even though from the acts of a vendor in the sale of a commodity, if such vendor, perchance, be the carrier thereof.

We submit with confidence that the section is not properly susceptible to any such construction.

1. ANALYSIS OF THE ACT TO REGULATE COMMERCE.

The intent of the legislative body, as expressed in the words of the statute, must control the Courts in their construction of such statute. And in seeking this legislative intent:

> "Resort may be had to every part of a statute, or, when there is more than one *in pari materia*, to the whole system." *Kohlsaat* v. *Murphy*, 96 U. S. 153–159.

Let us analyze the Act to Regulate Commerce, therefore, and seek what light we can from the whole context.

Section 1 of the Act begins as follows:

"The provisions of this act shall apply to *any common carrier* or carriers *engaged in the transportation* of *passengers* or property. . . ."

And "Transportation shall include all instrumentalities of *shipment* or *carriage.*"

And it provides that:

"All charges made for any *service* rendered or to be rendered in the *transportation* of *passengers* or *property* or in *connection therewith*, or for the *receiving, delivering, storage* or *handling* of such property, shall be reasonable and just." "And every unjust and unreasonable charge for *such service* is prohibited."

Section 2 prohibits special rates, rebates or drawbacks and other devices whereby one person is charged a greater or less compensation than another person for any service rendered or to be rendered

"in the *transportation*, of passengers or property," under like conditions and circumstances.

Section 4 provides that it shall be unlawful to charge or receive greater compensation in the aggregate

"for the *transportation* of passengers or of like kind of property under substantially similar circumstances"

for a shorter than for a longer distance over the same line.

Again in the same section it is provided that under certain circumstances common carriers may so charge less for a longer than for a shorter distance

"for the *transportation* of passengers and property."

Section 6 provides:

1. That every common carrier shall publish its schedule of rates and fares and charges

"for the *transportation* of passengers and property."

Such schedules shall contain the "classification of freight" in force and "the terminal *charges.*"

2. It shall be unlawful to charge any person a greater or less compensation than is specified in such schedules

"for the *transportation* of passengers or property, or for any service in connection therewith."

3. Joint tariffs for through

"*transportation* of passengers or freight" over different lines shall be published and filed with the Commission.

4. It shall be unlawful for any common carrier, party to any joint freight tariff, to charge any person a greater or less compensation than is specified in such joint tariff

"for the *transportation* of persons or property or for any service in connection therewith."

5. If such rates as required to be filed be not filed in accordance with this section, an injunction may be issued against the carrier in default to restrain such carrier

"from receiving or *transporting* property among the several states &c."

Section 7 provides that it shall be unlawful for any common carrier to enter into any combination or contract to prevent a *continuous carriage* by

"change of time schedule, carriage in different cars, or by any other means or devices."

Section 10 provides that whenever,

"by means of false billing, false classification, false weighing, or false report of weight, or by other device or means"

any common carrier or officer or agent thereof shall permit or assist any person to obtain

"*transportation for property* at less than the regular rates then established"

it shall be deemed a misdemeanor.

If any person shall by payment of money or other thing of value, solicitation or otherwise, induce any common carrier, or any of its officers or agents to discriminate unjustly in his favor

"in the *transportation* of property"

he shall be guilty of a misdemeanor.

Section 22 provides that nothing in this Act shall prevent

"the *carriage, storage or handling* of property"

free or at reduced rates for the United States, &c.

Section 23 (Act March 2, 1889) provides that the U. S. Circuit and District Courts shall have jurisdiction upon complaint by any person that he is prevented by a common carrier, by reason of its violation of the Act to Regulate Commerce, from having interstate commerce moved by such carrier at the same rate as others are charged and under conditions as favorable as those given to others,

"to issue a writ or writs of mandamus against said common carrier, commanding such common carrier *to move* and *transport* the traffic, or to furnish *cars or other facilities* for *transportation* for the party applying for the writ."

Thus it will be seen that each of the sections above noted (the only ones of the Act to Regulate Commerce, except section 3, having any bearing on the policy and intent of the law) have reference only to

1. "*Transportation* of passengers or property;"
2. "Any *service* in *connection therewith*;"
3. "Receiving, delivering, storage, or handling of such property;"
4. "Terminal *charges*;"
5. "Time schedules, carriage in different cars;"
6. "False billing, false classification, false weighing or false report of weight;"
7. The furnishing of "cars or other facilities for *transportation*."

From this analysis it clearly appears that the sole intent and spirit of the Act is to provide for reasonable rates, equal charges, fair dealing and equal facilities in the "*transportation* of *passengers* and *property*." And it is in the light of this spirit and intent that section 3 must be read.

That section provides in its second clause:

"Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and *equal facilities* for the interchange of traffic between their respective lines, and for the *receiving*,

> *forwarding*, and *delivering* of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their *rates* and *charges* between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

Thus in the very section under consideration, in its second clause, the like spirit and intent is plainly manifest. That is, the intent to legislate with reference to the "transportation of passengers and property and *any service* in connection therewith," and with reference to nothing else.

It is well settled law that the general subject and purpose of the statute, read as a whole will restrict the meaning of general words in some portion of the statute in order to effectuate the true legislative intent.

As Chief Justice Marshall said in *Pennington* v. *Coxe*, 2 Cranch 33-52:

> "That a law is the best expositor of itself; that every part of an act is to be taken into view for the purpose of discovering the mind of the legislature; and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act, are among those plain rules laid down by common sense for the exposition of statutes which have been uniformly acknowledged."

In that case a statute was under consideration in one section of which it was provided that "there be levied, collected, and paid, upon *all sugar which shall be refined within the United States* a duty of two cents per pound." But upon consideration of the whole act the general words were restricted in their scope so as to conform to the legislative intent; and the tax was held to apply only to such sugar as was refined in the United States *and removed from the factory.*

And as was said in *Kohlsaat* v. *Murphy*, 96 U. S. 153-159:

> "In the exposition of statutes, the established rule is that the intention of the law maker is to be deduced from a view of the whole statute, and every material part of the same;

> and when there are several statutes relating to the same subject, they are all to be taken together, and one part compared with another in the construction of any one of the material provisions, because, in the absence of contradictory or inconsistent provisions, they are supposed to have the same object as pertaining to the same system. Resort may be had to every part of the statute, or, where there is more than one *in pari materia*, to the whole system, for the purpose of collecting the legislative intention, which is the important inquiry in all cases where the provisions are ambiguous or inconsistent."

And this intent may be found to be limited in its scope to a narrower field than the use of certain general expressions would ordinarily imply if considered alone. In such cases the Courts do not hesitate to limit the scope of the general words and expressions so as to conform them to the real legislative intent as gathered from the whole act.

As was said in *Brewer* v. *Blougher*, 14 Pet. p. 198:

> "It is undoubtedly the duty of the Court to ascertain the meaning of the legislature, from the words used in the statute, and the subject matter to which it relates; and to restrain its operation within narrower limits than its words import, if the court are satisfied that the liberal meaning of its language would extend to cases which the legislature never designed to embrace in it."

See also

Washington Market Co. v. *Hoffman*, 101 U. S. 112, 116;
Petri v. *Commercial Bank*, 142 U. S. 644;
U. S. v. *Am. Bell Tel. Co.*, 159 U. S. 649;
U. S. v. *Trans-Missouri Frgt. Assn.*, 166 U. S. 290–320.

In accordance with the rules of construction as sanctioned in these cases, we contend that the words of general scope in the third section of the Act, should be so restricted in their meaning as to conform them to the general intent of Congress as disclosed by a consideration of the whole Act.

The clause of the 3d section now being considered is as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or

> unreasonable preference or advantage to any particular person, company, firm, or corporation, or locality, or any particular description of traffic, in *any respect whatsoever*, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in *any respect whatsoever*."

That is *in any respect whatever with reference to the transportation* of *passengers* or *property*. And the transportation includes (only) all *instrumentalities of shipment or carriage*.

Common carriers engaged in interstate carriage are the only ones subject to the provisions of the Act and are so subject only when engaged in and about *such carriage*.

And we suggest that the Court might well adopt in this case the language of the Court in *McKee* v. *U. S.*, 164 U. S. 287-293, as follows:

> "But we think a perusal of the whole Act prevents our giving this unlimited construction, because to do so would conflict with what we think was the intention of Congress, gathered from the provisions of the whole act. Under such circumstances it is not only the right but it is the plain duty of the Court to limit by a proper construction the otherwise boundless application of the general language used in the statute."

And this contention is further strengthened by an examination of the Elkins Act. It must be conceded that the Elkins Act and the Act to Regulate Commerce are *in pari materia*, and belong to the same "system." It is therefore proper to be considered in seeking the true legislative intent underlying the system.

The Elkins Act, in its general provision summing up the unlawful acts of a common carrier, provides:

> "It shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in *respect of the transportation of any property* in interstate or foreign commerce by any common carrier subject to said Act to Regulate Commerce and the acts amendatory thereto *whereby*

any such property shall by any device whatever be *transported at a less rate* than that named in the tariffs published and filed by such carrier as is required by said Act to Regulate Commerce and the acts amendatory thereto, or *whereby* any other advantage is given or discrimination is practiced."

In other words the "less rate," "other advantage," or "discrimination" must arise from a "rebate, concession, or discrimination *in respect of the transportation of any property.*"

And the "*any respect whatsoever*" of the 3d section of the Act to regulate Commerce must be restricted likewise to the same scope so clearly defined by the whole Act and those *in pari materia.*

It seems clear, therefore, that in holding the defendants below guilty of a violation of the provisions of section 3 of the Interstate Commerce Act, by reason of acts legally disconnected from any question of rates of transportation, the Court below erred.

2. THE TRUE MEANING OF SECTION 3.

But, even if the Court below was correct in its view that the provisions of section 3 were properly involved in the case before it, yet we contend that it erred in the interpretation it gave to those provisions and in the application it made of them to the case under consideration.

Let us see now what is the meaning of the 3d section of the Interstate Commerce Act which has been juridically applied. What is the kind or preference or advantage that is denounced by this section? Only that which is "undue or unreasonable." We cannot impute undueness or unreasonableness to an honest transaction made without any intent to violate any law and conforming itself to every principle of legal and moral rectitude and being fully understood by intelligent parties, each pursuing his own business.

The reasonableness of the transaction to the Chesapeake and Ohio Railway Company was obliged to be governed by the honest consideration imputed to the President of that Company

by the Court. He was intelligently endeavoring "to find a market for coal produced on his line." (Record p. 220.)

Its undueness could only be imputed to some partiality which preferred one person or locality over another.

There is not the slightest imputation of this kind either in the allegation or in the proof. Neither is there the slightest ground for the claim that any PARTICULAR DESCRIPTION of traffic was preferred over any other PARTICULAR DESCRIPTION of traffic. There is no scintilla or suggestion that the traffic of one miner in the Kanawha District of West Virginia was given preference over that of another miner in the same section or any other section. The record is as blank as a newly whitewashed wall with respect to allegation or proof as to any actual or any suspected discrimination between any species of traffic that could or did compete.

What is meant by the terms of the 3d section which denounces preference or advantage *to any particular person, company, firm, corporation or locality?* A PARTICULAR person is not *any* person. Neither is a PARTICULAR company, firm, corporation or locality any unknown or imaginable company, firm, corporation or locality. It was "rights" that the law sought to defend and there can be no rights without some person or thing for them to attach to; and the law says that the person, company, firm or corporation or locality or traffic to which they attach must be a PARTICULAR PERSON, &c. The law refers to persons and things concrete, and not to abstractions, visions and shadows.

3. THE EVIDENCE AS TO DISCRIMINATION.

It abundantly appears that the relator Bullitt was offered the same terms of freight that were offered to the public. (Record p. 11.) His view was that the transaction between the Chesapeake and Ohio Railway Company and the New York, New Haven and Hartford Railroad Company "is a discrimination against *all the other coal produced in the district,*" and he alleged that this prevented him from moving the coal in the Kanawha District which had been offered to him "at a price which is very

attractive to him." He does not state what that attractive price was and the complaint of the Interstate Commerce Commission utterly ignores this portion of his affidavit filed before them.

The conception of the court, therefore, that "some or all of the persons concerned with the Kanawha coal destined for points beyond the Capes other than that for the New Haven Company, were subjected to an undue disadvantage," was formed without the discovery or the suggestion of any particular one of these "some or all;" and they remain as only the shadows of imagination.

Farther than this there is plenary proof that the operators in the Kanawha District, instead of being sufferers by the transaction between the two railroad companies, were beneficiaries thereof. When President Ingalls was making his "entirely honest effort to find a market for the coal produced on his line," as declared by the Court, he was giving the benefit to the operators of the Kanawha District of the transaction had with the New York, New Haven and Hartford Railroad Company.

It was widely known amongst them and was availed of by practically all of the operators of the New River District. See Hotchkiss Affidavit p. 124; Thomas Affidavit p. 124–7.

The contract was known as a public matter to everybody interested in the coal fields; was regarded as favorable to the Chesapeake and Ohio Railway Company; it was executed so completely without discrimination of any kind against any shipper or miner of coal, or against any coal or class of coal produced in said district, that no injury was occasioned thereby to the affiant Garrison, who testifies, or to the business of any other mine operator so far as this affiant knows or believes. (Record p. 130.)

Samuel Dixon testified that the transaction was of common knowledge not only as to the shortage of the sixty thousands tons but as to how it was going to be supplied; and that "said agreement to supply the Kanawha coal worked no discrimination against the operators in the New River Field." (Record p. 133.)

Justus Collins testified that the whole transaction was well understood in both the New River and Kanawha Districts; that it worked no discrimination against either field; and that it was regarded by the coal operators as a most favorable and beneficial arrangement for the New River District and continued to be for at least three years of its existence. (Record p. 136.)

D. T. Evans testifies that the transaction was widely known along the Chesapeake and Ohio coal fields ever since it was made; and that deliveries of coal by the Kanawha Fuel Coal Company worked no discrimination whatever against his company, which was the Mount Carbon Coal Company. (Record p. 137.)

James Kay testifies that he did not desire to participate in the delivery of the sixty thousand tons of shortage and that the transaction worked no discrimination against the companies represented by him, three in number. (Record p. 138.)

E. P. Mucklow testifies that he is treasurer of two companies and that no discrimination whatever was worked against the coal of these companies. (Record p. 140.)

R. B. Cassaday testifies that the contract was a matter of common knowledge among every one interested in coal mining in the New River and Kanawha coal fields; that though his company in the Kanawha District did not care to share in the transaction it worked no discrimination whatever against the mines represented by him. (Record p. 141.)

D. A. Nease testifies as the President of the Kanawha and Coal River Coal Company that he had opportunity to share in the transaction but did not desire to do so; and that no discrimination whatever was worked against the coal of the mines represented by him. (Record p. 142.)

J. R. Clark, whose mines are in the Kanawha District, did not care to participate in the transaction but affirms that no discrimination was worked against the mines represented by him. (Record p. 143.)

It is therefore evident that the imputation of discrimination by the transaction in question against "some or all of the persons concerned with Kanawha coal destined for points beyond the Capes," is not only unfounded but overwhelmingly disproved. In fact every thread of evidence in this case demonstrates the pervasive knowledge of the contract—the openness of it to general participation of the operators of the only place held to be discriminated against; and the proof of the negative is in the record, with only a vague imagination against it which can neither discover or suggest the name nor describe the particular person, company, firm, corporation, or locality or species of traffic which has been either preferred or prejudiced in any respect whatsoever.

e. THE ERROR IN THE CIRCUIT COURT'S OPINION

With all respect to the eminent, able and industrious judge who presided over the Circuit Court, the conclusion is forced upon our minds by the perusal of his elaborate opinion that its fundamental error lies

1st. In not separating the advantages which must necessarily belong to the stimulation of trade and must necessarily and wholesomely attach to those who become wisely associated in it from that other class of advantages which flow from sinister devices and from improper considerations. An undue advantage must be founded upon an improper consideration. No improper consideration of any kind is suggested for the contract herein considered.

2nd. To hold that it would be possible for some one to suffer because of a particular transaction does not of necessity thereby make that transaction a discrimination of any kind such as the law has noticed or can notice. For, in fact and in legal contemplation, no person can suffer from a transaction which is honest and legal. If a railroad company takes away its works and track from a station, holders of property located in the abandoned vicinage must suffer. If a railroad company puts its shops or tracks at any place, adjoining property holders of necessity derive an advantage. But any loss suffered on the one hand is *damnum absque*

injuria or rather is no damage at all in legal contemplation; and on the other hand any benefit derived is no discrimination.

The transaction in this case, we must not forget, has been sustained in all its parts as a legal transaction without motive of wrong and as in itself involving no wrong. Its collateral and incidental effects are totally severable by law from its nature. Whether they may possibly prove disadvantageous to one person or advantageous to another is a mere question which arises inevitably out of all great transactions and is totally without the pale of legal jurisdiction.

The conception of the Court below that some or all of the persons concerned in the particular traffic with Kanawha coal destined beyond the Capes other than that for the New Haven Company was subjected to undue disadvantage can derive no reinforcement from effort to discover those persons in New York or New England, or from the considerations adduced in the opinion of the Court that by losing 23 cents per ton in actual deliveries of coal to the New Haven Company the Chesapeake and Ohio Railway Company thereby gave an undue advantage to that company or prejudice or disadvantage to those concerned in other coal that went to New York or New England from the West Virginia mines. In considering this view of the Court we call attention to the fact that the case made by the Interstate Commerce Commission predicates the wrong doing by the Chesapeake and Ohio upon the carriage of freight

> "between the Kanawha District in the State of West Virginia and Newport News in the State of Virginia at less than its published rates on file."

The case that ended in the complaint at Newport News in Virginia is, in the opinion of the court, translated to an unknown locality, to unspecified traffic, and to some person unknown somewhere in New England, provided he is anywhere. The case that comprehended only freight rates and which could be computed by a simple sum in addition and subtraction, becomes, in the juridical view, a vague, immeasurable and indefinable case of preference and

prejudice which can find no expression in figures, has no metes and bounds of operation, and no reference whatever to the gravamen of its own statement. Nor is the case made by the court one that could by any possibility have been made consistent with the clear and lucid principles which the court had previously declared. When it held that there was no device in the case, nor intent to do wrong and in point of fact no wrong actual or constructive with respect to freight rates, it covered the whole ground of its jurisdiction; for that was alike the matter which the statute tied to the freight rate when it prohibited discrimination and also the matter distinctly set forth in the complaint.

When the Court declares in its opinion that every conceivable case of preference or advantage given by a carrier to "*one person*" or prejudice caused to be suffered by "*some one else*" is forbidden by the 3d section of the Interstate Commerce Law, it looks in vain to find, or to hear of that one person who was preferred and the "*some one else*" who was prejudiced or might conceivably have suffered is not even an unknown person in an iron mask. Imagination may conceive many persons and many things but until a distinct person has conceived of a particular wrong which he describes and of a particular person who did that wrong or suffered that wrong it is as impossible for a case to be made in court of his imagination as it would be to build a house without material, or as of old "to make bricks without straw."

f. THE REAL QUESTION INVOLVED.

The upshot of the matter is that the question which presents itself for decision is whether or not a carrier acting in good faith and with entire honesty and making a contract unquestionable in its legal aspects, can by the mere fact that it loses upon that transaction thereby pass into a stage in which such loss may be legally regarded as an undue preference or advantage to the party which gets the benefit of such loss or an undue prejudice or disadvantage to some unknown party who has not participated in the transaction?

To state this question is to answer it. Were it answered affirmatively a legal principle would be affirmed which would render it impossible for a carrier doing unquestioned things to know until a final settlement of accounts whether the law had been violated or not. No standard can be possibly raised by which it could be known beforehand whether there would be profit or loss and, consequently, none by which it could be known whether the law was, or might be, violated or not. The vice of the principle invoked lies in the fact that a damaging preference or prejudice or discrimination is imputed to some unknown person as flowing from a transaction in itself legal; and in relating back from the event of a transaction a characteristic ascribed to it which did not exist when it took place and which could not by any possibility be foreseen.

The laws of the Roman tyrant, hung up so high and written so fine that none could fairly read them, would not be so oppressive as a law of wrongdoing involved in the inscrutable mysteries of futurity and chance which no human mind could explore, and which must forever remain unknown to the greatest intellect and to the purest heart as well as to the stupid and wicked.

The exercise of rights cannot be the cause of legal damage. Only wrongs can create damage in the contemplation of the law. Whatever detriments may flow to any person from things honest and legal in themselves are not damage but mere liability to the accidents of fortune and to the incidents of life which inevitably attend on human concerns. Illegality must exist and damage must flow from specified illegality in order to give status in court to any complainant. That complainant must appear and show himself to be the party upon whom the illegality has operated and upon whom the damage has been inflicted; or else the agencies of the law must show the illegality to exist as a menace of wrong before any court can take jurisdiction of it.

There can be no wrong arising from any preference or any advantage which casually or incidentally flows out of contracts

legal and honest in themselves, for the reason that they are not undue. Neither can any person claim for himself, or the law claim for any person, that he has been prejudiced or disadvantaged from the granting of a preference or advantage that is not undue to another. It is the undue thing and only the undue thing that is prohibited in the Interstate Commerce Act.

The undue thing is "that which is not right;" "not legal or lawful;" "improper," as Bacon says, quoted by Webster in his Dictionary.

This is the sense in which the word 'undue' is used in the statute and is the natural interpretation thereof.

PART IV.

THE INJUNCTIVE ORDER SOUGHT BY THE INTERSTATE COMMERCE COMMISSION.

An inspection of the record will disclose that after the Court below had rendered its opinion in the case and filed the injunctive decree restraining the defendants from in any manner seeking to carry out the contracts held to be void, counsel for the Interstate Commerce Commission moved the Court to enlarge the terms of the decree so as to prohibit the said defendants from further or other breach of the Interstate Commerce law. (See Record pp. 229 and 241.)

This motion was overruled by the Court and it is with particular reference to this decision of the Court below that the Interstate Commerce Commission has prosecuted a cross appeal. Reference to the assignment of errors on the part of the cross appellant discloses the weight and importance it attaches to this feature of the case.

We confidently maintain, however, that the Court below correctly overruled the motion for the enlargement of the injunctive decree.

1. AN INJUNCTION MUST BE SPECIFIC.

It is a general principle of equity jurisprudence that every decree of a court should be specific and certain in its character; and that it should clearly apprise the parties to the proceedings

of their rights and duties thereunder. This is particularly true of injunctive orders whereby parties are directed to the performance or are restrained from the performance of specific acts.

a. DEFINITIONS.

This idea of certainty and definiteness is exemplified by the very definition of the term.

> "An injunction is a judicial process issuing out of a court of chancery, whereby a party is required to do or to refrain from *doing a particular thing.*" 16 Am. and Eng. Ency. of Law, p. 342.
>
> "A writ of injunction may be described to be a judicial process, whereby a party is required to do *a particular thing* or to refrain from doing *a particular thing,* according to the exigency of the writ." 2 Story's Equity, 861.
>
> "Its office is to require a party to do or to refrain from doing a *particular thing* according to the exigency of the occasion as indicated on *the face of the writ.*"

See

Spelling on Injunctions, sec. 3.
Anderson's Law Dictionary—'Injunction.'
High on Injunctions, sec. 1.

As is seen, all these definitions ascribe to an injunction the character of an order definite and specific in its terms. The decisions of the courts are likewise quite uniform in announcing that principle of equity jurisprudence.

b. JUDICIAL DECISIONS.

In *Robinson* v. *Clapp*, 65 Conn. 365, the Court said:

> "The Court also erred in granting an injunction in so indefinite terms. It is impossible to lay down any precise rule of universal application upon the subject. But the person enjoined is entitled to know with reasonable certainty what acts he may and may not do without making himself liable as in contempt of an order."

And in *Lyon* v. *Botchford*, 25 Hun. 57, the Court said:

> "The injunction order . . . should show upon its face all those things which it is necessary for the defendant to know

in order to obey it, and should plainly indicate to the defendant specifically all the acts which he is thereby restrained from doing, without calling upon him for inferences or any conclusions only to be arrived at by a more or less uncertain process of reasoning and about which the parties might well differ in opinion either as to the facts or law. The act prohibited must be the doing of some tangible or distinct thing or series of things, to be clearly pointed out and described."

See also

Sullivan v. *Judah*, 4 Paige 444; *Moat* v. *Holbein*, 2 Edw. Ch. 188.

The doctrine is well stated also in *Laurie* v. *Laurie*, 9 Paige Ch. (N. Y.) 235, as follows:

"As the defendant is bound to obey the process of the Court at his peril, the language of the injunction should in all cases be so clear and explicit that an unlearned man can understand its meaning, without the necessity of employing counsel to advise him what he has a right to do to save him from subjecting himself to punishment for a breach of the injunction."

A case directly in point is *Southern Pacific Co.* v. *Colorado Fuel and Iron Co.*, reported in 42 C. C. A. Rep. 12. In that case a decree was entered by the Circuit Court to the following effect:

"First, that the defendants be enjoined and restrained from further continuing to violate and disobey the Interstate Commerce Act, and particularly to abstain from violating the order of the Interstate Commerce Commission of November 25, 1895, the substance of which order has been heretofore stated;

"Second, that the defendants be enjoined and required, in respect of complainant's traffic (between points named) to cease and desist, on and after March 25, 1899, from unjust and unreasonable charges, or from demanding a greater compensation for service to be rendered complainant than they charge other persons for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, or from giving undue and unreasonable preference and advantage to particular persons, corporations, and localities at

> Chicago, Ill., and elsewhere eastward of said city, or from subjecting the complainant and its traffic to undue and unreasonable prejudice and disadvantage and unjust discrimination, or from preventing the complainant from having its interstate traffic moved upon terms and conditions as favorable as those given by them for like traffic under similar conditions to other shippers; . . ."

Upon appeal, the Circuit Court of Appeals reversed the decree and ordered the bill dismissed. In discussing the decree, Thayer, J., said:

> "Such an order does not give any additional sanction to the statute; neither does it forbid the doing of any specific acts. It simply leaves the questions whether the threatened rate is reasonable, or whether it would operate as an undue preference or as an unreasonable discrimination, to be tried and determined in a proceeding for contempt before a chancellor, instead of being tried in the usual way before a court and jury, in an action for damages, after the rate has been exacted or actually demanded on a tender of property for shipment."

And in a recent case in this Court, Mr. Justice Holmes, delivering the opinion of the Court, and after commenting on the vast scheme alleged in the bill and the new problem in pleading presented by the case, which made it difficult for the Courts to deal with such cases without departing somewhat from accepted ideas of injunctive orders, said:

> "On the other hand, we equally are bound *by the first principles of justice* not to sanction a decree so vague as to put the whole conduct of the defendant's business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law."

And again:

> "The defendants ought to be informed as accurately as the case permits what they are forbidden to do. Specific devices are mentioned in the bill and they stand prohibited. The words quoted are a sweeping injunction to obey the law, and are open to the objection which we stated at the beginning that it was our duty to avoid."

Swift and Co. v. *U. S.* (October term 1904.)

2. THE DECREE ENTERED IN THIS CASE AND THE AMENDMENT ASKED.

So far as the terms of the injunction order that was entered in the case at bar is concerned, assuming that the case was correctly decided by the Court below, it complies with the requirements for injunctive orders as laid down in the authorities above cited and is without objection. The enlargement urged by the Interstate Commerce Commission, however, would violate the "first principles of justice" mentioned by Mr. Justice Holmes.

Under the first assignment of error filed by the Interstate Commerce Commission, it is contended that the injunction

> "should have enjoined and restrained the N. Y., N. H. and H. R. R. Co. and its officers and agents from seeking or accepting in any manner any direct or indirect rebate of the duly established freight rates of the C. and O. Ry. Co. on any interstate commerce, and from seeking or accepting in any manner from said railway company any undue or unreasonable preference or advantage."

In other words the contention is that the Court should say to the New Haven Road:

> "You must not seek or accept any direct or indirect rebate of freight charges from the Chesapeake and Ohio. Nor must you seek or accept any undue or unreasonable preference or advantage from the Chesapeake and Ohio. If you do, this Court will punish you for contempt."

It sounds much more specific and certain upon first reading than a careful consideration of its terms discloses it to be.

What constitutes a rebate of freight charge? What constitutes an undue or unreasonable preference or advantage? These are questions that have puzzled the brightest of our judicial minds. They are questions about which reasonable men, and even learned judges, may very properly and very honestly differ in opinion. Yet the effect of such an order as is contended for would be to compel the New Haven Road to determine the nice question (as it might be and often is) in advance. And moreover it would compel it to determine that question just as the

particular Court below would determine it, under pain of contempt. The fact that learned counsel had been called in to advise would be no defense. The fact that another court had determined the question a particular way would be of no avail to relieve the New Haven Road from liability for punishment for contempt.

It seems to us that the mere statement of this obvious result carries with it conviction that the proposed order is too broad and sweeping.

3. THE ELKINS ACT.

But, it was urged on the part of the Interstate Commerce Commission in the Court below, the Elkins Act was enacted to provide just such injunctive relief as is sought in this case. We submit that the language of the Elkins Act is not properly susceptible to such construction.

That Act provides:

> "And upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and processes . . ."

The Elkins Act thus conferred upon the federal courts original jurisdiction to consider alleged violations of the Interstate Commerce Law without waiting, as was necessary before the Elkins Act was passed, for an investigation and order by the Interstate Commerce Commission. The above quoted language conferred upon these courts the power to enforce "an observance of the published tariffs" and to "require a discontinuance of such discrimination." How? By "proper orders, writs, and processes." What are the proper orders, writs and processes? Clearly an injunction is to be included among them; but can it be held that any sort of injunction may be entered? Is there anything in the Act that would indicate that the courts are thereby given the power to enter orders without regard to "the first principles of justice?" Would an order that disregarded such first principles be a *"proper order?"*

Counsel for the Interstate Commerce Commission refer to the case of *U. S.* v. *Michigan Central Railroad Company*, 122 Fed. 544. In that case an injunction was granted somewhat like the injunction sought in this case. But there the injunctive order was a temporary order entered without objection pending a hearing on the merits. Moreover, in that case the bill charged a conspiracy and combination on the part of the defendants for the purpose of preventing competition, to sustain freight charges, and to circumvent the interstate commerce law. It was not a single transaction that was involved but a whole system of rate charging growing out of, as alleged in the bill, a conspiracy and combination to violate the law.

Considerable weight was likewise attached to the decision in the *Debs Case*, 158 U. S. 568. But that case furnishes no parallel. There the bill charged a conspiracy to effect certain unlawful purposes. The facts were alleged and proved. As Mr. Justice Brewer said, the proceedings were in the nature of a bill to keep the peace, and the conditions called for the "fullest exercise of the Court's power." It was an unusual case, calling for an unusual remedy. Vast interests were involved, both public and private, and the acts enjoined had been threatened and were alleged to have been threatened.

In the present case, nothing of the sort is either alleged or proved. The transaction out of which this case grows was a simple, single, isolated contract, disconnected with any other contract or system of business. It was free from intent to violate the law, much less was there any threat or declared purpose so to do.

And even if in any case an injunction such as the Interstate Commerce Commission urges could properly be entered, this is not such a case as would justify it. It is a clear principle of equity jurisprudence, no less well founded and no less well settled than the one above discussed, that to justify an injunction,

"The injury threatened must be actual and *impending*. A party seeking this remedy must show not only clear legal right, but a well grounded apprehension of immediate injury to such right."

Spelling on Injunctions, sec. 12.

And in section 18 the same author says:

"An injunction is never granted except for substantial reasons founded on actual interest. Nor is an injunction justified by the fact that if there be no intention on the part of the defendant to do the acts feared the injunction can do no harm. The court will not interfere unless the evidence shows a *probability of defendant doing the act which it is sought to restrain.*"

It was in obedience to this very principle that this Court, in the case of *Swift and Co.* v. *The United States*, restricted the injunctive decree to the very violations of law alleged in the bill to be contemplated and threatened. This is shown by the last paragraph of the opinion by Mr. Justice Holmes, in which he says:

"It only remains to add that the foregoing question does not apply to the earlier sections, which charge direct restraints of trade within the decisions of the Court and that the criticism of the decree as if it ran generally against combinations in restraint of trade or to monopolize trade, ceases to have any force when the clause against "any other method or device" is stricken out. So modified it restrains such combinations only to the extent of certain specified devices, which the defendants are alleged to have used and intend to continue to use."

There is no allegation in the petition in this case that the defendants have any intention of violating the Interstate Commerce Act. There is not one particle of evidence that even tends to prove any such intent on the part of either of the defendant companies. Yet it was urged by counsel for the Interstate Commerce Commission that the injunction sought should be entered because the defendants had been shown to be "violators of the law." But there is nothing in the record to support such a charge. So far from being violators of the law in the sense that

is suggested by the use of such a term, the whole case discloses but a single transaction which the lower court holds to be a violation of the law. And this transaction was held to be a mere technical violation, unintentional on the part of the defendants. Such a single transaction and of such a character surely cannot render the defendants violators of the law so as to require an unusual and extraordinary decree to keep them peaceable and law abiding.

The power of injunction has been called the strong arm of the law; but its strength is never exerted in the way of punishment. It is used only to restrain. When so exerted it has fully served its purpose; a step beyond and it becomes punitive.

PART V.

THE OPTION IN THE CONTRACT OF 1896.

The seventh assignment of error by the Interstate Commerce Commission is as follows:

> "The Court should have held that the contract of Dec. 3, 1896, between the C. and O. Ry. Co. and the N. Y., N. H. and H. R. R. Co., was an option to the N. Y., N. H. and H. R. R. Co. to take within five years any amount of coal which it may want, not to exceed two million tons, and not exceeding 400,000 tons per annum, and the Court should have held further that the C. and O. Ry. Co. had the option on July, 1, 1902, to cancel all portions of said quantity of coal remaining undelivered." (See Record p. 243.)

Much stress was laid by counsel for the Interstate Commerce Commission, in the argument below, on the exact wording of the original contract of December 3d, 1896. An examination of the *fac simile* on page 190 of the Record will show that it was typewritten on a regular printed form of the New York, New Haven and Hartford Railroad Company. It will be noted that wherever the contract is in typewriting the word "*railway*" company is used throughout. When the Chesapeake and Ohio is intended those words are used as a prefix. When the New Haven Road is intended it is simply written "railway company," and each time it is so used it follows closely upon the printed reference to the

New York, New Haven and Hartford Railroad Company, making the reference all the more clear and certain.

It was pointed out by counsel for the Commission below that the Chesapeake and Ohio is a *Railway Company* while the New Haven is a *Railroad Company*. It is true that the corporate names show this distinction. But it is the well known custom and habit of people generally to use the terms 'railway' and 'railroad' interchangeably. The Century dictionary declares them to be synonymous terms and it is doubtless true that the word railway was used throughout by the typewriter without regard to the technical corporate names of the contracting companies.

However, an examination of the contract shows that the New Haven Company is intended in each instance that "railway company" is used without any prefix. The first instance is in the clause of the contract which reads as follows:

> "And said railway company has the right to terminate this contract at any time if said bituminous coal be of poor quality or if its delivery be unnecessarily delayed."

Obviously this was intended to give the right of termination to the New Haven Company. It would be absurd to suppose that this contract by which the Chesapeake and Ohio undertook to furnish coal should give to that company the right to terminate the contract on account of the poor quality of its own coal which it was to furnish or on account of the delay in its own deliveries.

As the Court below said in its opinion:

> "It is true that the contract gave the New Haven Company an option as to the amount of coal (not exceeding the stated limit) it might order. But I think this clause was intended to cover the contingency of an order being made by the New Haven Company, and the coal on delivery being of poor quality or the deliveries being unduly delayed." (Record p. 213.)

Indeed, it would be difficult to give it any other rational construction.

The second instance is in the clause which reads:

"Said railway company has the right to cancel any and all portions of said quantity of bituminous coal remaining undelivered on July 1st, 1902."

It is equally obvious that the New Haven Road is given this right of cancellation. The Chesapeake and Ohio undertook to deliver coal within a certain period. If it did not deliver it within that period the right to cancel undelivered portions was given to its contractee. It would be absurd to suppose the Chesapeake and Ohio could undertake to furnish coal within a certain time and then elect whether or not it would do so and cancel its obligations by such an election.

The reasonable intendment is clear, and the course of dealing between the parties to the contract comports therewith, that if the Chesapeake and Ohio did not deliver the coal called for in the monthly requisition by the date set as a limit, the New Haven Road was given the privilege to refuse to accept the deliveries after that date. And while the Court below follows a somewhat different course of reasoning, it reaches practically the same conclusion.

CONCLUSION.

The Public and Commercial Necessity for Long Term Contracts for Coal.

In any consideration of this transaction the time at which it was made, the conditions under which it was made, and the gigantic nature of the commerce and industry of the country which have rendered such transactions indispensable to society, should not be overlooked. The time was one succeeding crisis, when strikes, lockouts and paralysis of trade had deeply affected the whole nation. The conditions which had produced all manner of disorders were starvation and cold and riot and murder menacing the great centres. To stop coal or bread in a city was to organize anarchy.

The New York, New Haven and Hartford Railroad Company is a great company, moving thousands of tons of freight and thousands of passengers per day. It could not feed itself from

hand to mouth as a citizen may from the corner grocery. It could not fire its engines as a man may light a match taken out of his vest pocket. A day's stoppage of its trains meant far more than ruin to itself. It meant paralysis to commerce; to the mails of the United States; to the bread of families; to remittances to and from banks; to pensions for invalids; to medicine for the sick; to concerns which embraced everybody of the human society to be served, and everything that concerns society. It meant distraction and damage. To provide coal for its enormous and myriad transactions the company had to make great contracts. From the train between Boston and New York with its thousands of passengers and its thousands of tons of freight, to the mines of West Virginia with its thousands of miners and operatives; from the poor woman at her kitchen fire with her crying children around her to the mighty factory with its blazing furnaces and its whirring wheels; from the hospital with its wan patients to the excursion from the crowded city for a breath of fresh air; there was widespread distress and danger impending. Both the Chesapeake and Ohio and the New Haven roads were in the immediate menace of that danger, not only to their investors, not only to their customers, but to their very structure, should the panic come which every good heart and which every honest mind prayed might be averted.

The "*modus vivendi*" and efforts of orderly living were the things to be subserved by every energy that could be put in operation. When honest energies without device, and honest intellects without guile, provided to meet the present necessities in a way that the law could not question, it would seem like desecration of law and an invocation of "Evil, be thou my good," to impute UNDUENESS to practical and honorable things that were done, or to regard as a disadvantage to anybody, *in esse* or *posse*, the accomplishment in righteous ways of righteous ends in view.

Coal is one of the great and absolute necessities of a railroad. It must be constantly on hand in large quantities. It is a necessity, created by their situation and conditions. A railroad

company should have a steady supply coming in through a regularly organized channel. This necessity has been met in the past by the New York and New Haven Company by purchases from coal dealers covering large quantities of coal and considerable periods of time. The contract with the Chesapeake and Ohio Railway Company was a contract of this identical character.

Now, if the reasoning of the lower Court is sound, then such contracts can no longer be made with safety, however clothed with legality. If the validity, legality, fairness and commercial wisdom of a contract at the time of its execution do not give it a character that will survive changing commercial conditions, then indeed must the New Haven Road and other railroad companies tremble for the constancy and volume of their coal supply, and for the stability of their institution and its business. The commerce and the welfare of the people must tremble with them.

The Court below said in its opinion:

> "While a carrier may become a dealer in articles of transport, and can sell (and consequently can contract to sell) such articles at a price which pays, or practically pays, the cost items and its own published freight charges, yet whenever the cost items so substantially rise that the loss to the carrier (as a dealer) and the subsequent advantage to the purchaser consignee, or the disadvantage to someone else, becomes unreasonable or undue, such sales become (or such contract becomes) illegal. When such a state of fact comes to exist the carrier must plead the illegality of the transaction and cease to perform." (Record p. 225-226.)

We are aware that it is considered unfortunate to be at the losing end of a contract. But it is new doctrine that it is also unlawful to suffer loss in a business transaction. We do not think this Court will lend itself to the enunciation of any such doctrine. If the carrier vendor must cease to perform its contract of sale as soon as it becomes unprofitable, is the purchaser consignee entitled to the converse privilege of avoiding the contract if changing commercial conditions place it at a disadvantage

and the carrier vendor in a more profitable situation? One would seem to be just as fair and reasonable a proposition as the other. And the ultimate result of such a doctrine would be to render all such contracts as is involved here dependent for their legality upon the stability of market prices, labor, wages and other cost items which, in the nature of things, vary almost daily. A contract would then become a fast and loose affiair, without sanction.

In the account of profit and loss at the end of the transaction, which might have been one of profit all along, both to the Chesapeake and Ohio and to the New Haven Road, we cannot write damage to some person unknown when no one who is known suggests damage. Nor can we regard either the possibility of eventual loss or its actuality as relating back and seizing hold of a transaction which sometimes resulted in gain and might all the time have resulted in gain.

Livy has a fine sentence in speaking of a certain character in which he says: "*Adparebat quo nihil iniquius est ex eventu famam habiturum.*" He contemned the character to whom the accident of fortune had given fame. Here the Court is asked to watch the sliding scale of profit and loss; to arrest the contractor the moment the loss mark is reached; to ascribe to the transactions of commerce, which always float on the choppy and tumultuous sea of changing conditions, a shifting standard as elusive and misleading as it is impracticable and unjust.

The following sentence of the Court's opinion, it would seem to us, shows the correctness of this view. The Court says:

> "While a carrier may become a dealer in articles of transport, and can sell (and consequently can contract to sell) such articles at a price which pays, or practically pays, the cost items and its own published freight charges,"

Now mark the qualification:

> "yet whenever the cost items so substantially rise that the loss to the carrier (as a dealer) and the subsequent advantage to the purchaser consignee, or the disadvantage to someone else, becomes unreasonable or undue, such sales become (or such contract becomes) illegal." (Record p. 225.)

Thus while it is admitted that the contract was wholly unimpugnable when made, and for all the time in which the cost items of the coal and the published freight charges due the Chesapeake and Ohio were covered by the price received from the New Haven Road for the coal delivered, it is also urged that it became, in the view of the court, impugnable when the cost items for the coal to the Chesapeake and Ohio were such that the loss to that company in the selling of it, and the subsequent advantage to the New Haven Road, or the disadvantage to someone else became "UNREASONABLE" or "*undue.*" In short, although right "reason" and all "dueness" may pervade a contract, if times and prices change, and the unexpected obtrudes itself on the losing side of the ledger, it at once paralyzes performance and knocks sky high all contracts that do not continuously and unceasingly prosper.

The court also gives its opinion that the carrier company had a right to "cease to perform contracts made in good faith whenever the cost of the article, or the other cost items, go to such a point that the contract price does not equal, or practically equal, the cost items and the carrier's published freight rates." IN OTHER WORDS, ALBEIT THAT THE FREIGHT RATES BE ALL THE TIME FULLY COVERED BY THE MONEY RECEIVED FROM THE COAL SOLD AND CARRIED, ALTHOUGH IN THE FREIGHT RATES THERE MAY BE NEITHER ACTUAL NOR POSSIBLE DISCRIMINATION AGAINST ANY PERSON WHATSOEVER, OR FOR OR AGAINST THE CARRIER ITSELF, THE GIST OF THE COURT'S OPINION IS THAT THE CARRIER CANNOT LOSE ON THE PRICE IT PAYS FOR COAL (ALBEIT ITS CHARACTER AS VENDOR IS UNASSAILABLE AND NOT JURISDICTIONAL EVEN TO THE FEDERAL COURTS) WITHOUT THEREBY GIVING AN UNDUE PREFERENCE TO SOME PERSON, OR INFLICTING AN UNDUE DISADVANTAGE UPON SOME OTHER PERSON UNKNOWN.

This view does not rest upon any principle of federal jurisprudence, upon any doctrine of common law, upon any question that is jurisdictional to this Court, and can only be reached by

obtruding into consideration a matter as alien to the validity of this contract as is the charter of either the Chesapeake and Ohio or of the New Haven road. Neither does it rest upon the law of trade or the essential nature of trade, for no law of trade—neither the law merchant nor any new custom or habit of trade—ever has looked, or ever can look, to profit and loss accounts of a vendor to impugn a transaction which was legal and honest when entered into.

The States of this Union are forbidden to impair the obligation of contracts. Contracts valid and legal are vessels which hold vested rights; holy vessels, we may call them, for they contain sacred obligations. They are enshrined and defended in the Constitution of the United States against the hand of any State whatsoever. It is neither to be presumed or imagined that Congress—representing the jurisprudence of a nation whose common law and public spirit, and whose entire jurisprudence indeed, considers a right vested a right sacred—designed in a statute to smash contracts rightful in their inception and which are honest in their nature the moment they cease to be profitable to one of the contractors; or to make the contractor himself the judge of the time when they so cease to be profitable; and enable him to repudiate them as soon as the line drawn left him on the losing side.

The refined process of reasoning by which the eminent judge below concludes that Congress has done this could only be sustained by imparting to words a strained and unnatural meaning and extending their significance beyond the range of a fair and just contemplation.

The whole question comes back to the character of the original contract and the subsequent contract which is but an extension thereof and dependent upon and based upon that original contract. The Chesapeake and Ohio Railway Company has a right, so far as this case or like cases may be concerned, to go into the coal business. If this be true then it has a perfect legal right to lose money in that business as it has to make a profit therein. It

does not matter whether the contract here involved was profitable or unprofitable, THE CHESAPEAKE AND OHIO ALWAYS GOT ITS FREIGHT RATE ON THE SHIPMENTS MADE UNDER IT. What the Chesapeake and Ohio as a coal dealer got for its share of the proceeds is not a question with which the federal statutes concern themselves. This is, of course, always assuming that the transaction, as here, is one of good faith and free from device to evade the law.

As Mr. Justice Day said in a recent case in this Court:

> "It may be that the Commission or the courts will ultimately find that these contracts do not fix the compensation received by the carriers, and that, as claimed, the full rate is paid by these purchasing companies, and if there is a loss on these contracts it is made up in other business . . ."
>
> *Interstate Com. Com.* v. *Baird*, 194 U. S. p. 44.

We submit respectfully that this Court should, certainly upon the facts in this particular case, hold as Mr. Justice Day intimates.

And we believe it will hold that the Chesapeake and Ohio Railway Company realized at all times its regular published freight charges; and that so far as this case is concerned, no other question is involved.

We have argued this phase of the case as if it were properly before the Court. In fact we do not think it is, as it is not within the allegations of the petition. That has been sufficiently considered.

The injunction should be dissolved and the case remanded with instructions to dismiss the petition of the Interstate Commerce Commission.

Respectfully submitted,

JNO. W. DANIEL,
FRED HARPER,
Of Counsel.